Nebraska Law Review

Volume 74 | Issue 4 Article 6

1995

Public Use, Substantive Due Process, and Takings—An Integration

Lawrence Berger
University of Nebraska College of Law, lawrence.berger@unl.edu

Lawrence Berger*

Public Use, Substantive Due Process and Takings—An Integration

TABLE OF CONTENTS

I. INTRODUCTION

In differing ways the three related doctrines of public use, substantive due process, and takings all provide landowners a measure of protection from various unlawful impingements by government upon their rights to own, possess, use, or transfer realty. The three sets of rules all stem from one sentence in the Fifth Amendment to the Constitution: "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."[1] That sentence, *inter alia*, raises the following questions that are respectively discussed here under the above three rubrics: (1) As interpreted the Constitution permits the government to condemn private property only when it is for a "public use." Under what circumstances may it be said that a taking is for that purpose? (2) The Supreme Court has held that the Due Process

* Robert J. Kutak Professor of Law, University of Nebraska-Lincoln.

1. U.S. CONST. amend. V. Though there is no express provision in the Fourteenth Amendment prohibiting the states from taking property without just compensation, the U.S. Supreme Court held that the Amendment's due process clause incorporated the taking prohibition and made it binding upon the states as well. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

Clause provides more than a mere guaranty that when the government seeks to deprive a person of his life, liberty, or property, it must do so with fair procedures; rather the protection of the clause extends to substantive matters as well. Under what circumstances may it be said that a government regulation is so substantively illegitimate that its implementation would deprive a person of his property without due process? (3) In what kinds of situations, other than the obvious one of a complete governmental seizure of the title to and possession of property, may it be said that the government has "taken" a person's property thus requiring that he be compensated for its activity?

Though it is clear that the three doctrines deal with quite different issues and should not be conflated, we shall see that unfortunately the Court has failed to maintain clear lines of demarcation between the substantive due process and takings rules and has introduced some unnecessary overlap and confusion in their application. As a result it has failed to recognize that since the two have entirely different purposes and underlying policies, appropriately the remedies for their breach should necessarily be quite different from each other. On the other hand, though the substance of the Court's rules about what is a public use is subject to criticism,[2] it has applied an appropriate remedy for its breach, and there has certainly been no confusion of the doctrine with the other two.

This Article first recapitulates the often uncertain content of the three doctrines and in the process discusses the purposes and policies of each. It then argues the courts should keep in mind those different purposes and policies in devising the appropriate remedies for enforcing each of the rules in order to avoid handling functionally equivalent land use problems in ways that are irrationally inconsistent with each other. Finally, with the help of a hypothetical, the Article attempts to outline an approach that integrates the purposes and policies of the rules with the appropriate means of enforcing them.

II. THE PUBLIC USE DOCTRINE

This doctrine prevents government from condemning property unless it is for a "public use." Its obvious purpose is to prevent government from seizing, even with compensation, the property of one person merely to benefit another private person. Historically there was a fierce debate over whether the rule required that the property seized by the government be taken for actual use by the public or merely that the taking resulted in some benefit to the public.[3] How-

2. *See, e.g.*, Lawrence Berger, *The Public Use Doctrine in Eminent Domain*, 57 OR. L. REV. 203 (1978); Thomas W. Merrill, *The Economics of Public Use*, 72 CORN. L. REV. 61 (1986).

3. For a review of the history of the doctrine, see Berger, *supra* note 2, at 203.

ever, that issue has seemingly been finally settled at least as a federal matter by the Supreme Court's latest opinion on the subject, *Hawaii Housing Authority v. Midkiff*.[4] In that case, a Hawaii statute authorized a state agency to condemn realty so that it could be resold to the tenants occupying the properties. The purpose of the statute was to break up the land holdings of the few families that owned almost half of the state's land in fee simple so that their properties could be turned over to those other private parties. Clearly no use of these lands by the public or any segment thereof was contemplated.

In upholding the law's constitutionality, the Court said: (1) a law authorizing realty condemnation is valid as for a public use if it is "rationally related to a conceivable public purpose";[5] (2) "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers";[6] and (3) "[r]egulating oligopoly and the evils associated with it"[7] was a valid "classic exercise of a States's police powers."[8]

The Court also dealt with the standard for reviewing whether the means of condemnation was rationally directed toward achieving the articulated public purpose. It said that it will uphold the condemnation if the state "rationally could have believed that the [Act] would promote its objective" and that "[w]hen the legislature's purpose is legitimate and its means are not irrational, [the] cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[9]

Broad as the Court saw the eminent domain power to be, still it recognized that there remain some limits to the purpose that government can lawfully have as its reason for a taking. In the same opinion the Court noted that, "[t]o be sure , the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose even though compensation be paid,' "[10] and that a statute authorizing condemnation would be invalid if it were passed "for no reason other than to confer a private benefit on a particular private party."[11]

In other cases, courts have upheld, *inter alia*, the condemnation of an entire neighborhood consisting of private homes, churches, and places of business, for the purpose of turning the properties over to a private manufacturer who would employ many persons in the area[12]

4. 467 U.S. 229 (1984).
5. *Id.* at 241.
6. *Id.* at 240.
7. *Id.* at 242.
8. *Id.*
9. *Id.* at 242-43.
10. *Id.* at 241.
11. *Id.* at 245.
12. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (1981).

and even rights of way to a public road for owners of landlocked realty.[13]

In summary, it can be said that as the law has developed, the public use doctrine looks to the purposes or ends of direct condemnations and upholds those that have a conceivable public purpose while it generally forbids only those which are done for strictly private purposes. The standard is a loose one and if a particular condemnation benefits both a private party and an important segment of the general public, the tendency of the courts is to uphold the right of the government to condemn the property (with, of course the concomitant duty to pay compensation).[14] The remedy where there is a breach, however, is crucial. When a condemnation is held to violate the public use doctrine, it is not enough for the government to pay the owner compensation; rather the court completely forbids the taking. And properly so, for it is perfectly appropriate for the courts to wholly prevent the government from engaging in a particular activity when its purposes are wholly illegitimate and outside the scope of its delegated powers.

III. SUBSTANTIVE DUE PROCESS—MEANS/ENDS REVIEW

Unlike public use inquiries, substantive due process reviews do not scrutinize direct condemnations but deal only with the validity of government regulations and regulatory activities. But like public use, substantive due process scrutinizes the legitimacy of the government's ends and the rationality of the means chosen to achieve them.

The history of the development of substantive due process has been recounted many times[15] and there is no point in making a complete recitation of it here; a sketch of the major developments will suffice. From the very beginnings of the Union, judges debated whether they had the power to invalidate the substance of legislation on the basis of a higher or natural law or whether they could do so only on the basis

13. For a compilation of the cases see, 2A PHILIP NICHOLS, EMINENT DOMAIN § 7.07[4][i] (Julius L. Sackman and Patrick J. Rohan eds., 3d ed. rev. 1995). The justification for this was that the "roads were private only in name. The public had the opportunity to use them as if they were public highways and, hence, they formed part of the public highway and commerce system in the state necessary for people to travel to discharge public duties." *Id.*

A number of states have enacted state constitutional provisions specifically authorizing these condemnations. *Id.* at § 7.07[4][i][*ii*].

14. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

15. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 432 (12th ed. 1991); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 15.1-15.4 (2d ed. 1992); FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE (1986).

Dean Strong's volume on substantive due process traces the origins of the doctrine to the Magna Carta and the English concept of the "law of the land." His thesis is that the proper historical role of the doctrine is twofold: to prevent monopoly and to prohibit the expropriation of private property.

of a particular clause in the Constitution.[16] While the latter view has prevailed formally, certainly the Court has asserted extremely broad powers to review the validity of state and federal legislation. One of the provisions that the courts early relied on for this purpose was the Due Process Clauses of the state constitutions[17] and the Fifth Amendment to the U.S. Constitution.[18]

It was not until after the Civil War, however, that the Supreme Court began to take a serious interest in using the Due Process Clauses of the Fifth Amendment and the recently ratified Fourteenth Amendment for the purpose of reviewing the substance of various federal and state regulations. Starting with the cases examining the reasonableness of utility rate regulation,[19] the Court over time expanded the reach of its substantive reviews to all manner of government regulations. This expansion was first foreshadowed in the case of *Mugler v. Kansas*.[20] In that decision, the Court upheld the constitutionality of a statute that completely destroyed the value of a preexisting brewery by outlawing statewide the manufacture and sale of intoxicating beverages. Nevertheless it noted that, "If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."[21] And the Court said it would not necessarily accept the lawmakers' mere assertion of the required relationship to public ends

16. See, for example, the debates between Justice Chase and Justice Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

17. See, for example, Wynehamer v. People, 13 N.Y. 378 (1856), where the court held that a state liquor prohibition statute violated the Due Process Clause of the New York Constitution to the extent it forbade sale of beverages owned prior to the enactment of the law.

18. In Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), the Court used substantive due process as one of the grounds for holding that the Missouri Compromise was unconstitutional, the theory being that it interfered with slaveowners' vested property rights in their slaves.

The Court also construed a Congressional statute so as to avoid what it said would surely violate substantive due process in Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553-54 (1852).

19. Stone v. Farmer's Loan and Trust, 116 U.S. 307 (1886); Munn v. Illinois, 94 U.S. 113 (1877). In both cases the court upheld the regulation but intimated that judicial review was appropriate in extreme cases.

In later cases, the Court struck down rate regulation that failed to give the utility a reasonable rate of return. Smyth v. Ames, 169 U.S. 466 (1898); Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418 (1890). These utility rate cases should properly be read as involving takings rather than due process issues, though in the last two cases mentioned the Court used the language of due process in its opinions.

20. 123 U.S. 623 (1887).

21. *Id.* at 661.

but in judging would look beyond "mere pretenses"[22] to the "substance of things."[23]

After *Mugler* there were a number of cases that struck down purported exercises of the police power as violations of substantive due process,[24] but what became the archetypal case was *Lochner v. New York*.[25] In *Lochner*, the U.S. Supreme Court was reviewing the affirmance by the New York Court of Appeals of an employer's conviction for violating a state statute which had made it a misdemeanor for bakery employees to be required or permitted to work more than sixty hours per week or ten hours per day. In what proved to be one of the most controversial decisions in its history, the Court, in a far-ranging opinion by Mr. Justice Peckham, reversed the conviction on substantive due process grounds. To do so it first had to distinguish the case from its earlier decision in *Holden v. Hardy*,[26] where it had upheld as a valid exercise of the police power a Utah statute which limited to eight hours per day the amount of time underground miners could work. The *Lochner* Court justified its striking down the bakery statute and its failure to follow *Holden* by distinguishing mining from bakery work, apparently on the basis of the hazardous and dangerous nature of the former.

The Court stated that under the police power a state could put "reasonable conditions" on the liberty or property rights of its citizens, including the liberty to enter into certain kinds of immoral or unlawful contracts. As the Court saw it, the issue was whether the statute was "a fair, reasonable, and appropriate exercise of the police power of the state, or . . . an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."[27] It eschewed any notion that a labor law to protect bakers was a valid exercise of the police power, because, as it saw the matter, the law did not involve "the safety, the morals, nor the welfare, of the public,"[28] and indeed it felt that "the interest of the public [was] not in the

22. *Id.*
23. *Id.*
24. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915)(state statute prohibiting employers from requiring as condition of employment that employees not join a union); Adair v. United States, 208 U.S. 161 (1908)(federal statute prohibiting interstate railroad employers from requiring as condition of employment that employees not join a union); Lochner v. New York, 198 U.S. 45 (1905)(statute prohibiting bakery employees from working more than 10 hours per day or 60 hours per week); Allgeyer v. Louisiana, 165 U.S. 578 (1897)(statute prohibiting purchase of insurance from company not complying with state law).
25. 198 U.S. 45 (1904).
26. 169 U.S. 366 (1898).
27. Lochner v. New York, 198 U.S. 45, 56 (1905).
28. *Id.* at 57.

slightest degree affected by [the] act."[29] To be valid an act must have a "direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before one can constitutionally interfere with the "right of an individual to be free in his person and in his power to contract in relation to his own labor."[30] The law could be upheld, if at all, only as a measure to protect the health of individual bakers and in this it failed as "there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee."[31]

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. . . . The court looks beyond the mere letter of the law in such cases.
>
> It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstance the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution.[32]

In his famous dissent to *Lochner*, Mr. Justice Holmes argued that the Court was attempting to import its economic theories into the Constitution.

> The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics . . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . .
>
> I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can

29. *Id.*
30. *Id.* at 58.
31. *Id.* at 59.
32. *Id.* at 64.

> be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.[33]

Despite the protestations of Holmes and Harlan (who also dissented), the Court in *Lochner* effectively reserved unto itself the power to decide whether: (1) the proclaimed end of the statute under review was legitimate; (2) the proclaimed end was "really" the end of the legislature at all or there was perhaps another illegitimate purpose animating the law-making body; and (3) even if the end was a legitimate one, the means selected were truly directed toward reaching it.

Over the next thirty years, the Court reached inconsistent results in the application of substantive due process to various economic regulations,[34] while the theory itself was under violent attack by the commentators.[35] By the 1930s the Court, manned with different personnel and facing the economic disaster of the Great Depression, was ready to give government much broader latitude in attacking the problems of the day. In a series of cases beginning with *Nebbia v. New York*[36] and *Home Building and Loan Association v. Blaisdell*[37] and ending with *Ferguson v. Skrupa*[38], the Court turned completely away from substantive reviews of economic regulation. In *Ferguson*, the Court was called upon to review a Kansas statute which made it a misdemeanor to engage in the business of debt adjustment except as incident to the practice of law. The Court in refusing to strike down the regulation said:

> The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a

33. *Id.* at 75-76 (Holmes, J., dissenting).
34. For example, though *Lochner* struck down a maximum hour law for bakery employees, the Court upheld a similar statute regarding female factory employees in Muller v. Oregon, 208 U.S. 412 (1908), and a statute requiring overtime pay for factory workers working more than 10 hours per day in Bunting v. Oregon, 243 U.S. 426 (1917).
35. *See, e.g.*, Fletcher Dobyns, *Justice Holmes and the Fourteenth Amendment*, 13 ILL. L. REV. 71 (1918); Charles M. Hough, *Due Process of Law—Today*, 32 HARV. L. REV. 218 (1919); Robert P. Reeder, *Due Process Clauses and the "Substance of Individual Rights"*, 58 U. PA. L. REV. 191 (1910).
36. 291 U.S. 502 (1934).
37. 290 U.S. 398 (1934).
38. 372 U.S. 726 (1963).

> unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection, which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . .
>
> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the Legislature not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.[39]

Ferguson represented the definitive end (at least for this period in our history) of the Court's substantive reviews of the legitimacy of ends and effectiveness of means with respect to what it called "economic legislation." However, the Court has continued to this day to make such reviews with respect to land use regulation[40] and has felt forced to resurrect substantive due process to protect certain "fundamental rights"[41] such as the right to privacy[42] and freedom of association.[43]

One can reasonably argue that the Court is justified in giving special substantive due process protection to certain defined fundamental rights. But its decisions, wherein it continues to act as a "superlegislature" in land use cases but not in other kinds of economic regulation

39. *Id.* at 730-32.

40. Nollan v. California Coastal Comm'n, 423 U.S. 825 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Nectow v. City of Cambridge, 277 U.S. 183 (1928)(striking down as a violation of substantive due process a zoning ordinance that did not bear a substantial relation to the public health, safety, morals, or general welfare); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)(upholding the power of municipalities to zone).

41. In United States v. Carolene Products Co., 304 U.S. 144 (1938), Justice Stone in his famous footnote 4 foreshadowed the fact that the Court would exercise strict scrutiny in reviewing laws that infringe on fundamental rights specifically guaranteed by the first ten amendments while giving much greater deference to laws that merely involved economic legislation.

42. Roe v. Wade, 410 U.S. 113 (1973).

43. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

cases, have never been satisfactorily explained. The truth of the matter, of course, is that the Court has never given up its power to make this kind of a review when it wishes to. At the moment it chooses not to do so as to most economic regulation, while it does so in various other kinds of cases. But is there any doubt that it would resurrect substantive due process—either by that name or another—in an economic regulation case, if the facts were egregious enough? Take for example, a statewide statute that forbade all but the XYZ Corporation from operating supermarkets in the state. If the statute survived state constitutional review, would the U.S. Supreme Court refuse to "act as a superlegislature" in such a case? I believe the question answers itself.

In addition to those cases of the Supreme Court already mentioned,[44] there has been a voluminous number of modern U.S. Court of Appeals cases involving substantive due process reviews of land use regulations.[45] These have typically involved suits under § 1983 of the Civil Rights Act[46] seeking damages and injunction for arbitrary and capricious denials of such things as building permits,[47] subdivision approvals,[48] or certificates of occupancy[49] or for unreasonably impeding the development of property.[50]

It should be emphasized, however, that the remedy available in all of these substantive due process cases, like the remedy in the case of the public use doctrine, has been to grant specific relief—in this case to void the regulation or regulatory activity at the option of the person harmed by it. In addition damages under § 1983 have been available for the harm done while the government imposition has been in effect.[51]

We turn next to a historical review of the development of takings doctrine.

---

44. *See supra* note 40.

45. *See, e.g.*, Sinaloa Lake Owners Ass'n v. City of Simi Valley, 864 F.2d 1475 (9th Cir. 1989); Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988); Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987); Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983).

46. 42 U.S.C. § 1983 (1988).

47. *See, e.g.*, Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983).

48. *See, e.g.*, Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987).

49. *See, e.g.*, Sullivan v. Town of Salem, 805 F.2d 81 (2nd Cir. 1986).

50. *See, e.g.*, Urbanizadora Versalles, Inc. v. Rios, 701 F.2d 993 (1st Cir. 1983).

51. For a full discussion of the remedies in land use cases under § 1983 of the Civil Rights Act, see Michael M. Berger, *The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional "Takings" Litigation*, 12 ZONING AND PLAN. L. REP. 121 (1989).

IV. EARLY TAKINGS LAW

Unlike the doctrines of public use, which deals with direct government condemnations, and substantive due process, which deals with the validity of government regulations, takings doctrine, as it has evolved, deals with the validity of governmental ongoing activities *and* regulations. Though, as we shall see, the Court has recently said that takings rules, like those of substantive due process, are aimed at making sure that the means used by government in its regulatory activities are directed toward a legitimate public purpose, that was not their function as originally conceived. The rules were historically designed to make sure that compensation was given for what were regarded as implicit takeovers of property by the government. Thus, early on, the Court took the position that a taking would occur when the government authorized the physical invasion of a person's property. For example, in *Pumpelly v. Green Bay Co.*[52] the Court held that when a state statute authorized the permanent flooding of a landowner's property so that it was unusable, this constituted a taking for which compensation had to be paid. The Court said:

> The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[53]

Since *Pumpelly*, the Court has made it abundantly clear that government activities involving a physical invasion of a person's land are *ipso facto* takings requiring that compensation be paid to its owner.[54]

When it came to losses caused by government *regulation*, however, the matter was less clear. Some of the Court's early cases could be read to hold that when the challenge was to a state regulation that

52. 80 U.S. (13 Wall.) 166 (1872).

53. *Id.* at 177, 178.

54. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); U.S. v. Causby, 328 U.S. 256 (1946).

completely destroyed the value of the owner's property, this could not be a taking because there was no physical invasion of the owner's property.[55] In *Mugler v. Kansas*,[56] for example, the Court took the position that the Takings Clause did not apply at all to a statute, which outlawed the manufacture or sale of intoxicating beverages, thus destroying the value of the defendant's brewery. The Court said:

> It is supposed by the defendants that the doctrine for which they contend is sustained by Pumpelly v. Green Bay Co., 13 Wall. 168. But in that view we do not concur. . . .
>
> These principles have no application to the case under consideration. The question in Pumpelly v. Green Bay Co., arose under the state's power of eminent domain; while the question now before us arises under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people. . . . [Pumpelly] was a case in which there was a 'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.' His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.
>
> As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[57]

Thus *Mugler* stood for the proposition that though a value-destroying regulation could not be a taking requiring compensation, it could be a deprivation of property without due process of law if it did not

55. New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453 (1905); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Mugler v. Kansas, 123 U.S. 623 (1887).

56. 123 U.S. 623 (1887).

57. *Id.* at 668, 669.

have a legitimate police power objective, such as the suppression of a nuisance. However, with respect to the takings point, some commentators have read *Mugler* to stand for a somewhat different principle known as the "noxious use doctrine."[58] Under that view the Court did not take the position that no land use regulation could be a taking, but rather the more limited view that a regulation aimed at prohibiting harmful activities could not be deemed a taking. According to that notion, if the nature of the use adversely affected by the government regulation was found to be noxious, wrongful, harmful, or prejudicial to the health, safety, or morals of the public, then government might validly regulate it and thereby decrease its value without the necessity of paying compensation to the owner.[59]

In support of the more limited "noxious use" reading of the *Mugler* case and its progeny, it should be pointed out that at the same time that the Court was seemingly proclaiming that regulations of land use could not be a taking, it was reaching the opposite result with respect to the regulation of utility rates. If the rates were "confiscatory" then they could be stricken down as a taking or perhaps a denial of due process. For example in *Stone v. Farmer's Loan and Trust,*[60] the Court said:

> From what has thus been said, it is not to be inferred that this power of limitation or regulation [of rates] is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a *taking of private property for public use without just compensation, or without due process of law.* What would have this effect we need not now say, because no tariff has yet been fixed by the Commission, and the statute of Mississippi expressly provides that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust.[61]

There are two matters particularly noteworthy in the above quotation. First, the Court, as it has done in a number of cases, lumped together the two concepts of substantive due process and takings without purporting to distinguish between them. Second, arguably oppo-

58. *See, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

59. Though the early cases stood for no such proposition, Professor Ernst Freund stated the principle in the alternative: "[I]t may be said that the state takes property by eminent domain because it is useful to the public and under the police power because it is harmful." ERNST FREUND, THE POLICE POWER 546-47 (1904).

In other words, Freund held that if the result of the governmental regulation was to achieve a benefit for the community, compensation must be paid; but if it was to terminate a harmful activity, no compensation was necessary. The original noxious use cases stood only for the second of the two propositions, but as we shall see, the courts later accepted Freund's formulation.

60. 116 U.S. 307 (1886).

61. *Id.* at 331 (emphasis added).

site to its contemporaneous position in *Mugler*, it opined that a too onerous regulation could be a "taking."

In *Lawton v. Steele*,[62] the Court indicated for the first time that a confiscatory land use regulation, that is, one "unduly oppressive upon individuals"[63] might be unconstitutional. However, it did not make clear whether it considered this to be a taking or a deprivation of due process. On the other hand, in *Hudson County Water v. McCarter*,[64] the Court in a dictum by Mr. Justice Holmes said that if a land use ordinance regulating the height of buildings was so onerous as to render the land "totally useless,"[65] this would require that the state pay "compensation and [use] the power of eminent domain,"[66] a clear statement that the regulation would be a taking.

Finally in *Pennsylvania Coal Co. v. Mahon*,[67] the Court, again in an opinion by Justice Holmes, but this time in a definitive holding, made it absolutely clear that it rejected any notion that an onerous land use regulation could not be a taking. In that case, the Court struck down a state statute upheld by the state courts, that, with certain exceptions not relevant, prohibited the mining of anthracite coal in such a way as to cause the subsidence of structures used for human habitation. The suit was an action brought by a superadjacent individual private homeowner to enjoin the defendant Coal Company from violating the statute by mining in a way that would cause the collapse of his house. Defendant Coal Company's defense was that the plaintiff's title stemmed from a deed made by it, which granted to the plaintiff surface rights, while reserving to the defendant the right to mine the subsurface coal, with the plaintiff also agreeing to waive all right to damages which might occur from such mining. Under the law of Pennsylvania, this gave the plaintiff a surface estate, while the Coal Company had the subsurface estate and a separate support estate. The Court viewed the matter as an unconstitutional taking of the entire separate support estate. It said:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested

62. 152 U.S. 133 (1894).
63. *Id.* at 137.
64. 209 U.S. 349 (1908).
65. *Id.* at 355.
66. *Id.*
67. 260 U.S. 393 (1922).

> parties to contend that the legislature has gone beyond its constitutional power. . . .
>
> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[68]

In *Pennsylvania Coal* the Court laid down the doctrine, known as the diminution in value test, that a land use regulation that was too onerous could in certain circumstances be a taking. This obviously left open the question of when the regulation might be said to go "too far." Certainly it does not happen too often, for it is interesting to note that in the seventy year period from 1922, the date of *Pennsylvania Coal*, until 1992, when it finally issued the opinion finding a taking in *Lucas v. South Carolina Coastal Council*,[69] the Court never found a regulation that went "too far." And though the cases are relatively infrequent, state courts have on occasion used the doctrine to strike down various individual land use control regulations that they deemed too onerous, such as industrial zoning and various development prohibitions.[70]

The policy of the Takings Clause was made clear by *Pennsylvania Coal*, however. It was later best, if cryptically, expressed in an opinion by Mr. Justice Black in *Armstrong v. United States*.[71] *Armstrong* was an otherwise obscure case involving a subcontractor materialman having a lien under state law for supplying materials for construction of boats under a contract between a contractor boat builder and the United States. The latter agreement required the contractor to transfer to the United States the title to uncompleted boat hulls upon his default of performance. When the contractor defaulted, title to the hulls was accordingly transferred. Though under state law, the materialman could have enforced his lien against any other person taking title under these circumstances, the United States claimed that he could not enforce his lien against it because it had sovereign immunity. The Court held that the acquisition was for a public use and totally destroyed the value of the lienholder's property interest and was therefore a taking.

The case is not notable for what it held, but is often cited for Justice Black's delineation of the basic policy underlying the takings rules, hereinafter designated as the Armstrong Policy: "The Fifth

68. *Id.* at 413, 415.

69. 112 S. Ct. 2886 (1992).

70. Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585, (N.Y. 1971)(regulation preventing building on buildable small lot); State v. Johnson, 265 A.2d 711 (Me. 1970)(regulation preventing filling of wetland); Dooley v. Town Plan & Zoning Comm'n, 197 A.2d 770 (Conn. 1964)(regulation preventing construction on floodplain); LaSalle Nat'l Bank v. County of Cook, 145 N.E.2d 65 (Ill. 1957)(residential zoning).

See also 3 R. ANDERSON, AMERICAN LAW OF ZONING § 3.28 nn.32-39 (3d ed. 1986) and cases therein cited.

71. 364 U.S. 40 (1960).

Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[72] Solving the riddle of when "fairness and justice" require that society rather than the individual should bear the cost of government impositions has proved to be one of the most difficult questions the Court has ever had to face. We will address that problem further in a later Part of the Article.[73]

V. THE REMEDY FOR REGULATORY TAKINGS

It is important to note the remedy that the Court used in *Pennsylvania Coal* when it held the statute was an unconstitutional taking of the Coal Company's support estate, viz., to refuse to enforce the statute, thus effectively voiding it and enjoining its enforcement. The unfortunate result of that was to allow the Company to continue its mining operations unhampered and consequently to destroy the homes of the superadjacent landowners.

If it had been available, a different remedy would have reached a result much sounder and fairer to both sides, while still leaving intact the basic taking decision. The remedy follows logically from the Armstrong Policy which underlies all takings rules—that of preventing the state from imposing upon an individual those burdens which in fairness ought to be borne by the general public. That better approach would be to give the regulator the option of compensating the Company and allowing the regulation to go into effect, thereby protecting the homes from collapse, or, in the alternative, acquiescing in the Court's voiding of the regulation, thereby, of course, imperiling them. If the regulator chose the former option, both sides would be protected by a procedure that allowed the homeowners to keep their homes and the Coal Company to be compensated for the taking of its property. The remedy was not available in *Pennsylvania Coal* because the regulator (in this case the state) was not a party to the suit. But in most cases challenges to regulations do involve the regulator as a party (or it can be made one), and it should be available.

The history of the compensation remedy for governmental acts deemed a taking is rather a complicated one and will only be briefly described here.[74] First of all, compensation has always been available

72. *Id.* at 49.

73. *See infra* text accompanying notes 172-75.

74. For discussions of the pros and cons of the compensation remedy, see Michael M. Berger & Gideon Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986); Theodore M. Cooperstein, *Sensing Leave for One's Takings: Interim Damages and Land Use Regulation*, 7 STAN.

when the government act involved a physical takeover of the owner's property.[75] The appropriate action was (and is) a suit in "inverse condemnation" where the plaintiff injured landowner sued the government wrongdoer for damages.

The real controversy has always been whether an owner who was the victim of a "regulatory taking" had a similar remedy in inverse condemnation, or the courts were limited to a declaration that the regulation was void and therefore unenforceable. In a number of states,[76] including California,[77] the courts held that the only appropriate remedy was the voiding of the regulation and that an action in inverse condemnation was unavailable, on the ground that the remedy would unduly inhibit planners in the execution of their functions. In other states,[78] the courts allowed the compensation remedy in addition to the traditional voiding remedy.

Although there were hints in some of its cases[79] that the U.S. Supreme Court approved the inverse condemnation remedy for regulatory takings, many felt that its position on the issue was not clear. The Court had an opportunity to clarify its position in a series of land use cases[80] in the early 1980s but for various technical reasons didn't reach the merits of the question. In a famous dissenting opinion in the *San Diego* case,[81] Mr. Justice Brennan argued strongly for the existence of the compensation remedy.

Finally in *First English Evangelical Lutheran Church v. County of Los Angeles*,[82] the Court faced the issue head-on and ruled in favor of

---

ENVTL. L.J. 49 (1988); Norman Williams, Jr. et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

75. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); United States v. Causby, 328 U.S. 256 (1946); Pumpelly v. Green Bay Co., 80 U.S. 166 (1872).

76. *See, e.g.*, Hamilton v. Conservation Comm'n, 425 N.E.2d 358, 365 n.13 (Mass. App. Ct. 1981); Fred F. French Inv. Co. v. City of New York, 350 N.E.2d 381 (N.Y.), *cert. denied and app. dismissed*, 429 U.S. 990 (1976).

See also Gene R. Rankin, *The First Bite at the Apple: State Supreme Court Takings Jurisprudence Antedating* First English, 22 URB. LAW. 417 (1990).

77. Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

78. *See, e.g.*, Annicelli v. Town of South Kingstown, 463 A.2d 133 (R.I. 1983); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978); Washington Market Enterprises, Inc. v. City of Trenton, 343 A.2d 408 (N.J. 1975).

79. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Hurley v. Kincaid, 285 U.S. 95 (1932). See discussion in Berger & Kanner, *supra* note 74, at 704-07.

80. MacDonald, Sommer, & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S 621 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

81. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S 621, 636 (1981).

82. 482 U.S. 304 (1987).

the remedy. In that case, the Church operated a campground with various buildings which were destroyed in a flood resulting from heavy rains after a fire had denuded the hills upstream from the area. Defendant County then adopted an ordinance that designated the area a flood plain and forbade reconstruction within it. The Church immediately brought an action in state court in inverse condemnation for damages for the loss of use resulting from the taking of its property. The California courts, following the holding of their Supreme Court in an earlier case,[83] ruled that an action in inverse condemnation was not available for a regulatory taking and that the only relief the courts could give was to void the regulation.

On appeal, the U.S. Supreme Court held that the Just Compensation Clause of the Fifth Amendment as carried over to the states by the Fourteenth Amendment requires that government pay for temporary regulatory takings. "[The] basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[84] The right to compensation is not based on any statute but arises from a right "guaranteed by the Constitution."[85] "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."[86] In the past various temporary seizures have been held to require compensation for a temporary taking. "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[87] Here the ordinance forbidding the use of the property was passed in 1979, and though plaintiff filed its suit within one month thereafter, it wasn't until 1985, six years later, that the Supreme Court of California denied a hearing on the claim. The merits of plaintiff's case are yet to be determined. "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."[88]

> "Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function 'for Congress and Congress alone to determine.' . . . Once a court determines that a

83. Agins v. Tiburon, 598 P.2d 25 (Cal. 1979).
84. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).
85. *Id.*
86. *Id.* at 316.
87. *Id.* at 318.
88. *Id.* at 319.

> taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of the power of eminent domain. Thus we do not, as the Solicitor General suggests, 'permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . .' We merely hold that where the government's activities have already worked a taking of all use of property. no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[89]

The Court then pointed out that its doctrine of temporary takings was a limited one and did "not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[90]

Finally the Court recognized that its decision would "undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them."[91] In the procedural posture of the case, the Court had assumed that the regulation would deprive plaintiff of all use of its property and that it therefore was a taking. It reversed and remanded the case to state court for further proceedings. On remand the California courts held that under the circumstances, plaintiff had not been deprived of all use of its property and therefore there was no taking.[92]

The importance of the *First English* case lies in its establishment, conclusively for the first time, of a right to compensation for temporary regulatory takings. But there is perhaps greater significance in what the Court had to say about damages for permanent takings. In two places in the opinion, it indicated that where a regulation is held to be a taking, the government has the option of continuing to enforce it permanently upon payment of damages or to acquiesce in its being voided.[93] This is a perfectly appropriate result. If the regulation has

89. *Id.* at 321 (internal citations omitted).
90. *Id.*
91. *Id.*
92. First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989), *cert. denied*, 393 U.S. 1056 (1990).
93. "Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

"The Court has recognized in more than one case the the government may elect to abandon its intrusion or discontinue regulations. . . . Similarly, a govern-

a legitimate public purpose, the government should be allowed to continue it in effect, as long as it is willing to pay those people who, in the words of *Armstrong*, should not be forced "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[94]

The rule has some other virtues as well. Importantly, it will force regulators to take into account the costs and benefits of the regulations they put into effect. Finally it will help put to an end the pernicious practice of some municipal regulators of what might be called serial regulation. For example, a developer wants to put in a shopping center on his property, and the city to forestall that passes an ordinance zoning the property as single family residential. When the state supreme court after four years of litigation voids the regulation, the city passes another ordinance zoning the property for multi-family residential. Other ordinances can be passed as needed to prevent the desired development. In the end no landowner is able to win a battle in which the city passes one law after another to frustrate his purposes. The inverse condemnation rule will help to end that kind of abuse.[95]

VI. EARLY MUDDLING OF TAKINGS AND SUBSTANTIVE DUE PROCESS[96]

It has been forcefully argued that the concept of substantive due process deriving from the Magna Carta and the English doctrine of the "law of the land" was historically directed toward the prevention of monopoly and of the expropriation of private property without compensation.[97] Under that view takings are one species of a deprivation of substantive due process. And certainly since there is no clause in the Fourteenth Amendment expressly prohibiting the states from taking property without just compensation, it is the Due Process Clause that incorporates the taking prohibition against them.[98] Be that as it

---

mental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking. . . ." *Id.* at 317.

94. Armstrong v. United States, 364 U.S. 40, 49 (1960).

95. For a good summary of the arguments concerning inverse condemnation, see Cooperstein, *supra* note 74, at 49.

96. For a thorough review of the history of the Court's treatment of the relationship between the two doctrines, see Michael L. Davis and Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 OR. L. REV. 393 (1989).

For the view that the taking doctrine is really a part of substantive due process, see STRONG, *supra* note 15.

97. STRONG, *supra* note 15.

98. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

may, as the law has developed over time, the very different ideas underlying substantive due process and takings have become quite clear to the modern lawyer. In pure form, due process now questions the legitimacy of the government impositions—does the regulation have a lawful objective and are the means utilized directed to reaching it? In contrast, takings rules deal with the *weight* of government impositions—even though in a particular case the government has a lawful objective and its means are directed to reaching it, is it fair under the circumstances for one person to bear all the costs of the imposition or would it be more just to require society to bear them?

It is perfectly obvious that it makes little difference what labels one puts on these very different concepts as long as sound rules are applied to each. The problem has been that historically the Court often neither carefully distinguished between the basic concepts nor consistently applied the same labels to them.[99] Often it has tended to put the two doctrines together in an unintelligible muddle. A good example of an early case which did that was noted earlier, *Stone v. Farmer's Loan and Trust.*[100] In that case in dealing with the problem of what the Court should do with confiscatory rate regulation, it said that such would be "a taking of private property for public use without just compensation, or without due process of law"[101]—a studied refusal to deal with the difference between the two concepts. Indeed it seems quite clear that confiscatory rate regulations are better analyzed as takings rather than as due process deprivations. Monopoly rate regulation has a valid purpose, but where it is confiscatory, it would seem that government should bear the expense of requiring the utility to charge its customers a price below its costs, and if government does not want to do so, then the regulation should be voided as a taking.

In the land use area, the Court also failed to distinguish between the two concepts. In the two cases that purported to deal with the constitutional limits upon zoning, *Village of Euclid v. Ambler Realty Co.*[102] and *Nectow v. City of Cambridge,*[103] the Court dealt with the issue as a matter of substantive due process. In the first it upheld generally the power of government to zone, holding that separation of land uses was a legitimate end and that zoning was a rational means of getting there. In the second, it struck down as a violation of substantive due process a particular regulation that the master below felt

99. See, for example, Chicago, B.& Q. Ry. Co. v. Illinois *ex rel.* Drainage Comm'r, 200 U.S. 561 (1906), where the Court said, "The constitutional requirement of due process of law which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power." *Id.* at 593. *See also* Stone v. Farmer's Loan and Trust, 116 U.S. 307 (1886).

100. 116 U.S. 307 (1886).

101. *Id.* at 331.

102. 272 U.S. 365 (1926).

103. 277 U.S. 183 (1928).

was irrational under the circumstances. Neither case discussed takings jurisprudence though they both involved substantial decreases in value as a result of the zoning regulation, and they both came after Justice Holmes' decision in *Pennsylvania Coal.*

VII. THE MODERN MERGER OF TAKINGS AND DUE PROCESS

After *Pennsylvania Coal*, *Euclid* and *Nectow*, the Court, with very few exceptions,[104] pretty much ignored local land use control problems for the next fifty years. In 1978, however, with the case of *Penn Central Transportation Co. v. City of New York*[105], it initiated a new period of intensive work in the area and also began what now seems to be an irreversible and unfortunate merger of the due process and takings concepts. In that case, plaintiff, owner of the Grand Central Terminal in New York City, brought suit seeking injunctive relief against the defendant Landmarks Preservation Commission after the latter had designated the building as a "landmark" under the landmark preservation statute and refused to approve plans for construction of a 50-story office building to be cantilevered over the Terminal. Plaintiff contended that defendant's refusal constituted a taking of its property without just compensation.

In holding it was not a taking and denying relief to the plaintiffs, the Court, in an opinion by Mr. Justice Brennan, attempted to summarize the takings jurisprudence of the last hundred years. First quoting *Armstrong v. United States*[106] Brennan stated that the basic underlying policy of the takings rules was to prevent government from imposing on one party those burdens that fairly ought to be borne by society in general.[107] Then he conceded that the Court had been unable to develop any "set formula" for determining how to apply that policy and that the jurisprudence of the area has been one of "engaging in . . . essentially ad hoc factual inquiries."[108] Nevertheless the "decisions have identified several factors that have particular significance."[109]

Brennan noted that one factor was the "economic impact of the regulation on the claimant and, particularly, the extent to which the

104. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
105. 438 U.S. 104 (1978).
106. 364 U.S. 40 (1960).
107. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 123 (1978).
108. *Id.* at 124.
109. *Id.*

regulation has interfered with distinct investment-backed expectations."[110]—a clear reference to Holmes' diminution in value test. Another consideration was the "character of the government action;"[111] more specifically a taking may occur when the government interference involves a "physical invasion"[112] of the owner's property. And "[m]ore importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."[113] And this would even include cases where there is a prohibition of "a beneficial use to which individual parcels had previously been devoted."[114]

Mr Justice Brennan's last point needs to be more thoroughly examined; it really involves a merging of the concepts of due process and takings. Under Brennan's analysis, the legitimacy of government ends and means becomes a takings as well as a due process question. But many of the citations he gives in support of the argument that where the public health, safety, morals, or welfare is served by a value-destroying regulation, this would not be a taking, are cases that had been thought by many to be illustrations of the so-called "noxious use doctrine" traditionally used in takings analysis. Those cases upheld such regulations as a government mandated destruction of cedar trees to prevent cedar rust to apple trees,[115] the prohibition of the continued operation of a preexisting brickyard after the surrounding area became residential,[116] and the prohibition of the continued operation of a long established sand and gravel mining business below the water table.[117]

The *Penn Central* case was an opening wedge in what became the final rejection of the noxious use doctrine by the Court and its replacement in takings analysis by what is very difficult to distinguish from a substantive due process standard in *Agins v. City of Tiburon*,[118] *Nollan v. California Coastal Commission*,[119] and *Lucas v. South Carolina Coastal Council*.[120] The noxious use doctrine had allowed the destruction of property values by regulation as long as its purpose was to pre-

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 125.
114. *Id.*
115. Miller v. Schoene, 276 U.S. 272 (1928).
116. Hadacheck v. Sebastian, 239 U.S. 394 (1915).
117. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
118. 447 U.S. 255 (1980).
119. 483 U.S. 825 (1987).
120. 112 S. Ct. 2886 (1992).

vent some "public harm." But the shift to a rule permitting the justification of a regulation by a showing that it serves the public health, safety, welfare, or morals allowed a much broader compass for regulation.

Though the early cases stood for no such proposition,[121] Professor Ernst Freund, in analyzing takings jurisprudence, had stated the noxious use principle in the alternative: "[I]t may be said that the state takes property by eminent domain because it is useful to the public and under the police power because it is harmful."[122] In other words, Freund held that if the result of the governmental regulation was to achieve a benefit for the community, compensation must be paid; but if it was to terminate a harmful activity, no compensation was necessary.

In *Penn Central* the dichotomy posed by Professor Freund between a regulation that terminates a harm to the public and one that secures a benefit to it was rejected as posing a false choice; rather, a regulation that seeks to do either is to be upheld as against a taking challenge. On that narrow point the Court's approach seems appropriate, for, as has been pointed out many times,[123] ending a harm also inevitably involves benefiting the public, and one cannot really distinguish one from the other. On the other hand, more importantly and ominously, the use in *Penn Central* of a means/public ends review in a takings analysis marks the beginning of the unfortunate merger of such reviews under both takings and due process rubrics in the modern cases.

In *Penn Central* Mr. Justice Brennan had stated that a regulation that advanced the public welfare was not a taking. A few years later in *Agins v. City of Tiburon*[124] the Court, in upholding the validity of a zoning ordinance limiting plaintiff's land to residential use against a taking challenge, stated in dictum the converse proposition that a reg-

121. The early noxious use cases did not distinguish between harm prevention and benefit extraction. They looked only to the former as a factor for decision. Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

122. FREUND, *supra* note 59, at 546-47.

123. "The transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit conferring' regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing the servitude on Lucas's land is necesssary in order to prevent his use of it from 'harming' South Caraolina's ecological resources; or, instead in order to achieve the 'benefits' of an ecological preserve. . . ." Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

See also Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 174 n.34 (1974).

124. 447 U.S. 255 (1980).

ulation that did *not* advance the public welfare *was* a taking. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . ., or denies an owner economically viable use of his land."[125] The Court agreed with the state supreme court's view that the ordinance advanced a legitimate public interest by discouraging the "premature and unnecessary conversion of open-space land to urban uses."[126]

In *Nollan v. California Coastal Commission*,[127] the Court, in the first modern case to do so, actually struck down as a taking, rather than as a denial of substantive due process, a regulation that flunked a means/ends nexus review. Stated more precisely, the Court held to be a taking a regulation, wherein, though the ends sought by the regulators were legitimate, the means selected were not fairly directed toward those ends. In the case, the Nollans sought a permit to tear down their small beachfront dwelling and replace it with a modern larger home. The Nollan property lay between two public beaches. The California Coastal Commission agreed to grant a permit if the Nollans gave the public an easement to pass across their beach from one abutting public beach to the other. The easement was to be along the shoreline between the mean high tide line and the seawall protecting the Nollan's property. The justification for the condition advanced by the Commission was that the new house would tend to decrease the public's ability to view the ocean. The Court held that the easement requirement constituted a taking of the Nollans' property. In support of that ruling it said that a "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' "[128] And conversely " '[a] use restriction may constitute a "taking" if not reasonably necessary to the effectuation of a substantial government purpose.' "[129] The Court felt that the condition did not advance the Commission's objective of protecting the public's view of the ocean since it is "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."[130] Therefore since there was no nexus between the easement attempted to be exacted (the means) and improvement of the public view (the end supposedly advanced), the attempt to impose the condition was an unconstitutional taking and void. The Court went on to

125. *Id.* at 260.
126. *Id.* at 261.
127. 483 U.S. 825 (1987).
128. *Id.* at 834.
129. *Id.*
130. *Id.* at 838.

say that if the State really wanted an easement across the property, it would have to condemn and pay for it.

The Commission also advanced the argument, as justification for demanding the easement, that a second nexus also was present. This was the nexus—traditionally required by the state court cases concerning the constitutionality of subdivision exactions,[131]—between the proposed private acts and community needs. The argument was that construction of the Nollans' new house would create a need that previously did not exist and that this would justify the State in requiring them to help relieve that need as a condition for allowing them to proceed with their construction plans. More specifically, it was argued that the new house would create a need for public view, which need would be satisfied by the proposed easement. Factually, of course, this was not true, because, as Justice Scalia pointed out, a new easement *along the beach* could not possibly solve the supposed problem of obstruction of view caused by the new larger house, which, after all, was well inland of the easement's location. The real reason the Commission wanted the easement was undoubtedly to give the public an uninterrupted right of way to various unconnected beach areas open to the public, and its purported justification was a mere pretext to acquire at no cost to the State, something for which it would ordinarily have to pay the applicant owners.

Although Justice Scalia purported to accept the Commission's private acts/public needs nexus for "purposes of discussion"[132] only, his statement, quoted above, that an easement along the water could not possibly reduce any obstacles to beach view "created by the new house,"[133] indicated his acceptance of the notion that the second nexus was also a requirement for a valid regulatory exaction. In other words, the *Nollan* opinion stands for the propositions that, for such a regulatory exaction to be valid: 1) the owner's proposed activity must create or contribute to the creation of a public need; and 2) the exaction must tend toward the satisfaction of that same need.

In the recent case of *Dolan v. City of Tigard*,[134] the Court made more clear exactly what a regulatory body has to show under the first point to justify the exactions that it requires in exchange for permission to develop. It borrowed from state cases in the subdivision exaction area that required a "reasonable relationship" between the exaction and the need created by the proposed development, but the

131. *See, e.g.*, Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Jordan v. Village of Menominee Falls, 137 N.W.2d 442 (Wis. 1965).

132. Nollan v. California Coastal Comm'n, 483 U.S. 825, 838 (1987).

133. *Id.*

134. 114 S. Ct. 2309 (1994).

Court modified that rule by substituting for it the standard that there must be a "rough proportionality"[135] between the two factors.

The *Nollan* opinion was notable in at least two respects. First, it established with finality, if the question was still in doubt, the dubious notion that judicial review of the nexus between means and ends, which was traditionally viewed as an issue of substantive due process, was a takings question as well. The Court was apparently enshrining as a permanent fixture in constitutional law a heedless merger of the very different concepts and policies involved in substantive due process and takings rules. Second, although the Court held that basically the same issue was involved in both the takings and due process inquiries, it carefully distinguished the burden of proof required under each, requiring heightened judicial scrutiny (similar to that given sex discrimination under the Equal Protection Clause) in reviews under the Takings Clause but mere rational basis scrutiny in reviews under substantive due process.[136] Thus, under *Nollan*, the same regulation might fail a means-ends test as a takings matter but pass it as a due process one. As a practical matter, then, the takings review, being the stricter one, would henceforth control the determination of whether a land use regulation would be held to be constitutional or unconstitutional in a means-ends review.

Though Justice Scalia did not purport to limit the application of his doctrine that it is a taking if the means are not reasonably directed toward reaching the regulator's articulated end, that doctrine must clearly be confined to cases involving regulatory *exactions*. For *Nollan* does not really answer the question of what the result should be when a regulatory *prohibition* is argued to be unconstitutional as a taking or deprivation of due process, on the ground that the means are not rationally directed toward the regulator's admittedly lawful purpose. To illustrate the problem, take the *Nollan* facts and suppose the regulation of the Commission was not an attempted easement exaction but a broad-gauged prohibition against any new construction on the property. Again suppose the purpose advanced for the regulation was that the Commission was seeking to preserve the view of those persons already on the beach—an obvious subterfuge. If the Commission had no other lawful purpose in mind, or if it had an unlawful purpose, (e.g. to succumb to the whimsical obsession of an influential next-door neighbor that he have the largest house in the neighborhood), then it is submitted that the regulation should be voided as a violation of sub-

135. *Id.* at 2319. In the case the Court held that the burden of demonstrating the required nexus was upon the regulator. The Court said, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

136. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

stantive due process, and that the government should not have the option of enforcing the regulation even upon payment of full compensation. The reason is that the government's exercise of power to pass legislation having only a private purpose is illegitimate, and just as in the case of a condemnation having a private purpose in violation of the public use doctrine, the government should be completely prevented from so acting.

On the other hand, a different problem is raised if the Commission in reality had an arguably lawful purpose in mind while falsely suggesting it had the purpose of view preservation. For example, suppose that it could rationally believe that construction of larger buildings could contribute to beach erosion and its real purpose was to alleviate that problem. Ostensibly under the rule in *Nollan*, the Court would hold the regulation to be a taking because it "failed to further the end advanced as justification for [it]."[137] I do not believe for one moment that the Court would reach that result, however. In *Nollan* the Court was dealing with the question of the constitutionality of an easement exaction required by a regulator using two pretextual, demonstrably false grounds: first, that construction of the Nollan's new home would block the view of those persons already on the beach; and second, that the easement would somehow solve that problem. The Court merely held that since the real motive for the regulation was to acquire civic passageway between two public beaches without paying compensation for it—something the Commission could surely lawfully accomplish by condemning and paying for the privilege—it should be required to use its eminent domain power and pay compensation if it really wanted to get that access for the public. But in the case where the Commission is not seeking to get something for nothing but is merely trying to accomplish another lawful purpose, for which it would not ordinarily have to pay compensation, e.g., to make a reasonable regulation to prevent beach erosion, the fact that it articulated a demonstrably false purpose in justification for the regulation should not invalidate it if it really had that other perfectly lawful purpose in mind. In such circumstances, the regulation would neither be a taking nor a denial of due process but rather a constitutional exercise of the state's regulatory power. The statement in *Nollan* that the regulation must "further the end advanced as justification for [it]"[138] must be read in the context of a regulatory exaction and not in that of a regulatory prohibition where it properly has no application. Admittedly such a problem should not arise very often, for why should the state allege a purpose which is obviously not served by its regulations when it has another lawful purpose in mind that is so served? It is only where it is

137. *Id.* at 837.

138. *Id.*

seeking an exaction for which it would ordinarily have to pay compensation that it would be motivated to so dissemble.

VIII. THE *LUCAS* CASE AND THE NUISANCE DOCTRINE

When the Court decided to review the case of *Lucas v. South Carolina Coastal Council*,[139] it was expected that, with the changes in the composition of the Court, some radical remodeling of the the law might occur. Change there has been, but it is not yet clear that it could be properly called "radical." In *Lucas*, plaintiff landowner sued in inverse condemnation for damages alleging that defendant state agency had by its regulation effected a taking of his property. In 1986 Lucas had bought for $975,000 two oceanfront lots on a barrier island off the South Carolina coast intending to use them to build two expensive homes in an area that had many such homes already built. Although there had been some regulation of beachfront areas since 1977, at the time he purchased there was none forbidding the construction of residences on the lots. In 1988 the state legislature, for the purpose of preventing beach erosion, enacted the Beachfront Management Act, which, as effectuated by a regulation of defendant agency, had the effect of preventing Lucas from erecting any permanent "occupable improvements" on the premises. Lucas promptly sued and argued that the complete extinguishment of the value of his property effected a taking of his property for which he was entitled to just compensation notwithstanding that the Act was concededly a lawful exercise of the police power. The trial court held that the regulation left the properties valueless and ruled in his favor granting him $1.2 million in compensation. The South Carolina Supreme Court reversed. It held that it was bound to accept the legislature's findings that new construction threatened serious beach erosion because Lucas failed to contest them, and that under the noxious use doctrine, when a regulation is designed to prevent such a serious public harm, no compensation is owed, even if the value of the property is completely destroyed by the regulation.

In an opinion by Justice Scalia, the U.S. Supreme Court reversed and remanded the case to the state courts for further proceedings. In what the dissenters regarded as a gross misreading of the precedents, Justice Scalia stated that there are two situations in which the Court has had what he called categorical rules—rules where the usual case by case balancing process to determine whether there is a taking is dispensed with.[140] The first is where the regulation authorizes the physical invasion of the property by some third party, and the second

139. 112 S. Ct. 2886 (1992).

140. The balancing process was described in the *Penn Central* case. See *supra* notes 105-14 and accompanying text.

"where [the] regulation denies all economically beneficial or productive use of land."[141] As justification for the absoluteness of the second rule, Scalia argued that where there is a total deprivation of beneficial use, this is really the functional equivalent of an outright physical invasion which concededly is always a taking, and, in addition, that such takings "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[142]

Scalia then took issue with the South Carolina Supreme Court's view that under the noxious use doctrine, if a law is aimed at preventing a serious harm to the public—in this case, the possible erosion and destruction of the coastline—that regulation is not a taking, even though it effects a total deprivation of the beneficial use of the property. The noxious use doctrine, said Scalia, was just an early assay at saying something quite different:

> It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. . . . "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that land use regulation does not effect a taking if it substantially advance[s] legitimate state interests.[143]

Scalia then went on to demonstrate that the traditional distinction of the noxious use doctrine between harm-preventing and benefit-conferring regulations—in which it was said that the former were valid and the latter invalid under the Takings Clause—was impossible to apply. The regulation in *Lucas*, for example, could be said to have the purpose of preventing harm to the coastline or of securing ecological benefits. Therefore, noxious use cannot serve as the "touchstone" to determine which regulations require compensation and which not. Rather, when involved with a regulation that deprives the owner of all economically beneficial use, one must look to whether the "proscribed use interests were not part of his title to begin with."[144] If those interests were part of his title at the common law then they cannot be completely confiscated without paying the owner compensation. The government is permitted to accomplish by regulation only what a court would already have allowed under the preexisting law of nui-

141. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).
142. *Id.* at 2895.
143. *Id.* at 2897.
144. *Id.* at 2899.

sance, so that the rights of the landowner are not *unexpectedly* destroyed by the regulation.

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. . . .
>
> Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.[145]

In Scalia's formulation if Lucas's construction of homes on his lots would not have been a nuisance at the common law, a regulation that attempted to prohibit such would be a taking for which compensation would necessarily have to be paid. The Court therefore reversed and remanded the case to the state courts for further proceedings to determine whether Lucas was already prevented from building by the state's "background principles of nuisance and property law."[146] If so prevented, the Act did not effect a taking, but if not, then this would constitute a taking for which compensation would be required if the state did not rescind the regulation. And even if the state were to rescind the regulation, Lucas would be entitled to damages for the temporary taking of his property. On remand the South Carolina Supreme Court held that there were no background common law principles that forbade Lucas's proposed use of the property and sent the case back to the trial court for the assessment of Lucas's damages by reason of the temporary taking.[147]

An important part of the opinion deals with the Court's rejection of the noxious use doctrine and its replacement with the background principles of nuisance rule. One might ask what difference the change will make in the actual decision of cases and indeed, when the matter is carefully analyzed, whether the Court has really made a substantive change at all. First of all there is an obvious similarity between the two rules: the conventional (though as we shall see, historically inaccurate) statement of the noxious use doctrine is that the challenged regulation is not a taking when its purpose is to forbid a use which is "harmful" to society, but is a taking when its purpose is to

145. *Id.* at 2900-01.
146. *Id.* at 2901-02.
147. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

secure a benefit for the community. The rule applies to all regulations adversely affecting value, even those completely reducing it to zero. On the other hand, the nuisance rule holds that when a regulation wreaks a total decrease in value, it is categorically a taking, except where common law principles of private and public nuisance indicate "that the proscribed use interests were not part of [the landowner's] title to begin with."[148] An ostensible difference between the two rules is that the noxious use doctrine exempts from takings challenges *any* regulatorily-caused diminution in value, while the nuisance rule applies only as an exception to the rule that *total* diminutions in value are categorical takings. But that difference is illusory, for if the nuisance rule insulates cases of total diminution from takings challenges, then *a fortiori* it would serve to exempt cases of lesser decreases in value.

There are some other important points to be made about Justice Scalia's rejection of the noxious use rule as well. A problem lies with his statement that the doctrine hinged on the distinction between harm prevention and benefit extraction. If one examines the classic cases in this area, involving prohibition of brickyards,[149] fertilizer manufacturing plants,[150] breweries[151] and cedar trees[152] one can look long and hard to find any statement contrasting those two factors. The complete emphasis of these landmark cases was upon the nuisance or at least the harmful nature of the proscribed uses. The benefit extraction part of the rule seems to have arisen from the statement made by Professor Ernst Freund in his book on the police power.[153]

If one grants that the noxious use doctrine as originally formulated looked only at the nuisance or harmful aspect of the activity, that doctrine and Justice Scalia's nuisance rule become strikingly similar. Both rules, it appears, are seeking to allow the government great latitude in dealing with the problems of harmful or damaging land use

148. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992).
149. Hadacheck v. Sebastian, 239 U.S. 394 (1915).
150. Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).
151. Mugler v. Kansas, 123 U.S. 623 (1887).
152. Miller v. Schoene, 276 U.S. 272 (1928).
153. If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to provided against.

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them but because their free exercise is believed to be detrimental to public interests; it may be said that the state take property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because "the property itself is the cause of the public detriment."

FREUND, *supra* note 59, at 546-47.

activity without having to pay compensation. But Justice Scalia's criticism of the noxious use doctrine as useless because of the impossibility of distinguishing between harm-preventing and benefit-conferring regulations, does seem disingenuous when one considers what the original noxious use doctrine really said. And while his critique would seem fair enough if one were to accept his assertion of what that doctrine held, still his argument rings a little hollow when one considers that the common law of nuisance itself has always been considered notably amorphous and uncertain.[154]

Still the question remains: what can one authoritatively say about the effect of this new rule upon the decision of actual cases? To answer that, it would be well to examine the famous above-described U.S. Supreme Court noxious use cases of the past involving prohibitions upon pre-existing breweries,[155] brickyards,[156] fertilizer manufacturing plants,[157] and cedar trees.[158] In each the Supreme Court upheld the constitutionality of the proscribing regulations based upon the notion that the government had the right under the police power to regulate those noxious activities to promote the public welfare. And in each the Court mentioned the *nuisance* nature of the regulated party's activities but without purporting to refer to the state's common law as such. Thus, it would appear that under the old noxious use doctrine, the courts were left completely free to use "general principles" in deciding questions of harm and nuisance, while they would apparently be tied to the state's common law of nuisance, with all of its variables and uncertainties, in deciding similar issues under the new rule. Each one of the above activities involved might or might not be a nuisance at the common law depending upon a number of circumstances, including, of course, the suitability of the plaintiff's use and of the defendant's allegedly wrongful use to the locality involved, the priority in time issue considered below, as well as other factors.[159] Justice Blackmun asserted in his dissent in *Lucas*, that the brewery in *Mugler* (as well as the brickyard in *Hadacheck*, the cedar trees in *Miller*, and the gravel pit in *Goldblatt*) were not common law nuisances;[160] that undoubtedly was true at least at the time that the par-

154. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984).

155. Mugler v. Kansas, 123 U.S. 623 (1887).

156. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

157. Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

158. Miller v. Schoene, 276 U.S. 272 (1928).

159. *See* KEETON, ET AL., *supra* note 154, at 616.

160. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2913 (1992)(Blackmun, J., dissenting).

ties started using their property in what later became an offending way.

It should also be emphasized that the full strength of the nuisance rule applies only where there is a complete destruction of value. Under *Lucas*, where there is such and there is no nuisance, that would categorically be a taking, but where the diminution is less than total—overwhelmingly the most common situation—the Court would be relegated once again to deciding the taking question by the admittedly uncertain method of balancing various factors and "engaging in . . . essentially ad hoc factual inquiries."[161] It is not clear whether any of the above cases would fit into the total destruction category, with the possible exception of *Mugler*, the liquor prohibition case. If they did not, and the courts held, as Justice Blackmun asserted, that the uses were not common law nuisances, then the question of whether the regulation was a taking would depend upon the uncertainties of that ad hoc balancing process.

The most difficult problem raised by the *Lucas* nuisance test, however, arises with respect to matters of timing. Take as an example the *Hadacheck* case, which involved the mandated shutdown of an existing brickyard, and assume that the regulation completely destroyed the value of the property.[162] When first used for that purpose, the property was out in the country. Over time the city grew into the area and the brickyard became surrounded by residences whose owners thought it offensive. Certainly at the time of its construction the brickyard was not a common-law nuisance, but arguably it became such as other inconsistent uses came to surround it.[163] Even so under Justice Scalia's nuisance test, it would appear that the brickyard could not be forced to close down without compensation for the reason that the "background principles of the State's property and nuisance law"[164] fail to indicate "that the proscribed use interests were not part of [the owner's] title *to begin with.*"[165] In other words it would be arguable that if the use was lawful at the time of construction, it could not be prohibited without compensation at some later time, because the owner had a right to rely upon the state of the law at the time of his expenditure of funds for acquisition and construction of his property.[166] On the other hand, the Court could hold under the nuisance doctrine that a landowner is presumed to know that under tort law, his activity, though not tortious in its present surroundings, might

161. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).
162. Actually the reduction in value was from around $800,000 to around $60,000, a 92.5% decrease.
163. See RESTATEMENT (SECOND) OF TORTS, § 840D (1979) for a discussion of coming to a nuisance.
164. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2900 (1992).
165. *Id.* at 2899 (emphasis added).
166. With respect to a first in time rule see Berger, *supra* note 123, at 165.

later be regarded as a nuisance as conditions change, and therefore he is not entitled to compensation when his use is forbidden in the light of new facts.

Still, *Lucas* directs the courts to apply the common law of nuisance to the taking problem, and if one were to apply the modern law of torts to the timing question in takings law, a good argument can be made that, contrary to the original holding, compensation should be given in a case such as *Hadacheck*. The problem arose in the famous case of *Spur Industries, Inc. v. Del E. Webb Development Co.*[167] which blazed some new paths in the law of nuisance. In that case the Supreme Court of Arizona held that the plaintiff developer of residences, who came into an area well after defendant had established a cattle feedlot in what was then open rural country, was entitled to get an injunction for nuisance against the defendant's operation of the feedlot, *but only upon payment to the defendant of the reasonable costs of moving or shutting down.* The court felt that defendant was not at fault in establishing its feedlot in open country and it would be unfair to impose upon it the costs of later arising conflicting uses.

Thus, analogously, it would appear that even if one could argue that the brickyard in *Hadacheck* had become a nuisance at the time of the passage of the prohibitory regulation, it should be protected because it was not a nuisance at the time of the investment in the operation. This would give effect to the Supreme Court's oft expressed policy consideration in the takings area of protecting "investment backed expectations."[168] There seems to be no justification for treating a tort suit differently from a regulation. Why should a land user, whose activity has only recently become a nuisance, be entitled to compensation from his complaining neighbors if they get a court order terminating his activity in a tort suit for an injunction, but be entitled to nothing if they use their political clout to induce a municipality to pass a proscribing ordinance? If "justice" requires compensation in the one case, it surely requires it in the other. The *Armstrong* Policy seems particularly applicable: An innocent person should not be forced to bear those "public burdens which in all fairness and justice, should be borne by the public as a whole."[169] Needless to say, if the Court were to follow this line of argument, the rule of *Hadacheck* would not be followed in those cases where there was a complete destruction of value.

Hadacheck involved the prohibition of one particular land use for the protection of other conflicting ones; a second kind of regulation involves a universal prohibition for the general good of society. The

167. 494 P.2d 700 (Ariz. 1972).

168. *See, e.g.*, Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).

169. Armstrong v. United States, 364 U.S. 40, 49 (1960).

timing problem also occurs with regulations of the latter kind. A good example of such a case is *Mugler v. Kansas*,[170] which involved the prohibition of the manufacture of intoxicating beverages in the entire state, effecting a complete destruction in value of the defendant's brewery. The Court pointed to the public nuisance nature of breweries as a ground for upholding their statewide abolition. But a public nuisance is a crime whose definition[171] must necessarily depend, *inter alia*, upon what the state legislature says is a criminal act at a particular point in time. Breweries had been perfectly lawful in Kansas until the legislature outlawed them, at which point they became a public nuisance. Again, it could therefore be argued that the "background principles of the State's property and nuisance law" fail to indicate "that the proscribed use interests were not part of [the owner's] title to begin with" and that under the *Lucas* test if breweries were lawful at the time of their construction, no law could totally destroy their value without compensation. Thus would *Mugler* be *sub silentio* overruled.

Only time will tell whether this change to a takings law more protective of the landowner will occur. It may be that, sooner or later, the Court will feel impelled to pull back from a full-blown application of its nuisance doctrine. Whether it should or not is another question. It would seem that if at the time Mr. Mugler constructed his brewery he had no expectation that the legislature would prohibit his activity, and there was no reason for him to have such, those "investment-backed expectations" should be protected by the courts. Again the Armstrong Policy seems apposite.

In summary, it appears that the net result of the change to the common law nuisance standard will be a tendency for the courts, in the very few cases where there has been a complete destruction of value, to strike down more regulations than they would have under the old noxious use doctrine, as they feel somewhat constrained by the admittedly uncertain contours of traditional nuisance law. That certainly was the effect in the *Lucas* case itself, where the South Carolina courts upheld the regulation under the noxious use doctrine but were forced to strike it down when they were held to be bound by the state's common law of nuisance. But because the rule in *Lucas* only applies to those rare cases where the decrease in value is total, the overall effect of the case will undoubtedly be much less than conservative takings reformers hoped for before the opinion was handed down.

170. 123 U.S. 623 (1887).

171. See RESTATEMENT (SECOND) OF TORTS § 821B (1979) for a discussion of public nuisance.

IX. A SOUND TAKINGS RULE

The Armstrong Policy should be the touchstone used in devising a sound takings jurisprudence. Takings rules deal with the fairness of imposing upon one person or a small group of persons burdens that benefit a large segment of society. In a sense, then, they have an equal protection component; they attempt to decide whether when government bears down harder on one person than the rest of society, there is some valid justification for its doing so. Such justification might be the wrongful or tortious conduct of the person, which the nuisance rule addresses, or that any detriments visited upon the person are *de minimis* or offset by a corresponding benefit to him. The latter point is what Justice Holmes meant in his discussion in *Pennsylvania Coal* of the "average reciprocity of advantage."[172] It would not be a justification, however, that imposing a substantial burden results in great public benefit, if the person is without fault and fortuitously in the position where it becomes cheaper and easier to have him rather than society to bear the cost.

This, of course, raises the question of what is meant by "without fault." By that I mean, not fault in the sense of moral culpability, but in the sense that the person exercised the care normally employed by a reasonable person to prevent economic loss to himself. Thus if the burden was reasonably expectable at the time of the owner's purchase of the property, no compensation should be due him, because presumably the price he paid would reflect that expectation. And if at such time, he made a property improvement which later suffered in value as a result of those reasonably predictable governmental acts, no recompense should be payable for such diminution in value.[173]

The real weakness of takings rules in general and the *Lucas* case in particular lies in the requirement that the challenged regulation cause a total decrease in value before an owner is afforded full takings law protection against a governmental imposition. *Lucas* holds that if the decrease is 100 percent, a categorical takings rule applies, but if it is only 98 percent, a different set of rules—involving the balancing of a number of factors—applies. The case can be fairly criticized for making so much rest on so little. Would it really be fair in a case like Mr. Lucas' to say that he would be entitled to a $975,000 recovery if his property was rendered worthless by the regulation but he would be entitled to nothing if its value was reduced a mere $965,000 to $10,000?[174] In another article I have suggested a first in time rule as

172. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

173. I have discussed this reasonable expectations theory in great detail elsewhere. *See* Berger, *supra* note 123, at 165.

174. Mr. Justice Stevens made this point but from the opposing standpoint in his dissenting opinion in *Lucas*. His point was that not even total decreases in value should be automatically compensated for when he said:

to takings that protects private parties from *all* unexpected and unexpectable onerous government impositions.[175]

X. AN ILLUSTRATIVE HYPOTHETICAL

The following hypothetical is offered to show the horrendous results that can occur with the careless failure to distinguish carefully between public use, substantive due process, and takings notions. Rich is a wealthy landowner whose estate, Opulence, lies near but does not abut a beautiful lake. Pauper, Rich's impecunious neighbor, owns Shambles, the property lying between Opulence and the lake. Shambles is an acreage upon which lies an ugly, deteriorating shack and some old decaying autos and other junk, all of which ruins Rich's view of the lake. Shambles is worth $200,000 as is and $210,000 as an empty lot. Opulence is worth $1,000,000 with its present uninspiring view of the lake, and would be worth $1,300,000 with Shambles vacant except for a large lawn. On the other hand, if Rich could acquire Shambles with its direct access to the lake and thus could appropriately landscape it, Opulence and Shambles together would be worth $1,650,000. In tabular form:

	As Is	Shambles Vacant	Both Owned by Rich
Opulence	$1,000,000	$1,300,000	$1,650,000
Shambles	200,000	210,000	
Total	$1,200,000	$1,510,000	$1,650,000

Rich has a great deal of political power, both locally and statewide and thus has the ability to procure any of the following governmental acts. First, City might condemn Shambles and pay Pauper $200,000 therefor and then sell it to Rich for the same price. Second, City might

---

> In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 S.C. Acts 634, s 3; see also Esposito v. South Carolina Coastal Council, 939 F.2d 165, 167 (CA4 1991).[ ] Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost both the opportunity to build and their homes) do not recover. The arbitrariness of such a rule is palpable.
>
> Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2919 (1992)(Stevens, J., dissenting).

175. *See* Berger, *supra* note 123, at 165.

condemn it and open it as a public park. Third, City might enact an ordinance forbidding any use on Shambles except a large lawn.

Obviously Rich would prefer to own both properties under alternative one above, with private access to the lake and a total value of $1,650,000. Of course this would not be costless to him; he would have to pay $200,000 for the benefits. But for that $200,000 cost he would reap an increase in value of $650,000 ($1,650,000 minus the $1,000,000 original value of Opulence) for a net increase in his net worth of $450,000.

If alternative two were used (City condemns Shambles and turns it into public park) Rich would reap a $300,000 increase in net worth, as the value of Opulence would increase from $1,000,000 to $1,300,000 at no cost to him. Rich would gain a view of lawn and landscaping, and, as a member of the public, access to the lake. But, of course, he would share those benefits with the public, and from his standpoint, this would not be as advantageous as the first alternative.

A similar $300,000 increase would occur under alternative three where the city zones out all construction on Shambles. Under it, Rich can gain many, but not all, of the advantages of ownership, for, unless he gets an easement over Shambles, he will have no access to the lake. But he still reaps the benefit of a $300,000 increase in value to his property stemming from the more desirable view at no cost to him.

If Rich were an "economic man," he clearly would opt for the first alternative, as it would result in the greatest net benefit to him over cost. Indeed if one assumes that the parties would value their properties at their market value and that society would benefit the most from that allocation having the greatest value, that would also be the most "efficient" result.[176]

It is interesting to recall what the law has to say about the various alternatives. First, no matter what economists might have to say about the question, it seems clear that any court, state or federal, would hold that the City's condemnation for the purpose of reselling to Rich is unconstitutional because not for a "public use". As mentioned earlier, though it is true that the U.S. Supreme Court has given great deference to legislation authorizing the exercise of the eminent domain power, still, there are limits to what the Court is willing to permit government to do, as the dictum in *Hawaii Housing Authority v. Midkiff*[177] shows. In that case the Court stated that a statute authorizing condemnation would be invalid if it were passed "for no reason other than to confer a private benefit on a particular private party."[178]

176. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 11-16 (4th ed. 1992).

177. 467 U.S. 229 (1984).

178. *Id.* at 245.

It seems quite clear that a condemnation just to benefit Rich in his private aesthetic preferences would surely be enjoined.

Of course, there is absolutely no question of the legal validity of alternative two, the condemnation of private land for use as a park that is truly open to the public. The interesting comparison is between alternatives one and three. If it is clearly unconstitutional to take the property and sell it to Rich, what about an ordinance that for all practical purposes requires Pauper to keep it for the sole benefit of Rich while presumably he is still obligated to pay realty taxes for the privilege?

Under *Lucas*,[179] it would appear as if the regulation prohibited all economically beneficial or productive use of the land and therefore categorical treatment of the issue would be appropriate. The only inquiry necessary therefore would be whether under preexisting principles of nuisance law, the government could forbid the offending use. Depending upon how deplorable were the conditions of the property, Pauper might be said to have maintained a nuisance, and a court might be justified in ordering it abated in a private tort suit brought by his neighbors. But assuming that is true, that would still not warrant ordering Pauper to confine his activities to the cultivation of a bluegrass lawn. The remedy would be limited to forbidding the violation, leaving the owner free to use his property in any way that did not continue the nuisance. Therefore analogously, it would seem that the only remedy a government regulation could validly require, would be a rule requiring Pauper to remove the offending, nuisance-creating property. And any regulation having the more onerous remedy of requiring that Pauper confine his activities to lawn-growing would trigger *Lucas* and therefore be a taking requiring the payment of compensation if the government did not withdraw the regulation.

Justice Scalia's opinion doesn't expressly deal with Pauper's situation of the excessive regulation of what is concededly a nuisance. He was thinking of cases where the "land [was required] to be left substantially in its natural state"[180] and *any use* of the property at all would be a nuisance to society, thus fully justifying a government regulation that forbids any beneficial use of it. He gave as examples of situations which he said were not takings because of their nuisance character: 1) the owner of a lake bed who is denied permission to fill it in because it would flood a neighbor's land; and 2) the owner of a nuclear power plant who is ordered to dismantle it when it is discovered that it is located on an earthquake fault.[181] In our hypothetical there is no public purpose justification for completely forbidding the construction of buildings on the property. The nuisance is not in the fact

179. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).
180. *Id.* at 2895.
181. *Id.* at 2900.

that the structures exist but in the fact that they are of substandard quality; therefore any regulation that did more than to forbid that which was the nuisance would be invalid as a taking.

Note under this analysis the difference in legal results between alternatives one and three. Under the public use doctrine, it is not enough merely to pay Pauper for condemning his property and reselling it to Rich; rather that rule *completely forbids* such a condemnation because it is for a private purpose. But if the City enacts an ordinance forbidding any use on Shambles except a large lawn, the public use doctrine does not apply. Rather under *Nollan* and *Lucas* this case could be analyzed as a taking for the reason that the regulation had no public purpose, in which case the government, by payment of compensation, could keep in effect, a regulation whose sole purpose is to advance a private interest. The point of this is obvious: if the government is absolutely prevented from condemning Shambles for a proscribed purely private purpose, it should (at plaintiff's option) be similarly prevented from enacting an ordinance having that same purpose. The proper way to deal with the ordinance is to allow the plaintiff to have specific injunctive relief as a matter of right if he wishes it. The government should not have the option of deciding whether to withdraw the ordinance or to keep it in force and pay compensation for it as the Court has held is the government's right in regulatory taking cases.[182] The appropriate cause of action for the plaintiff would be under a substantive due process rather than a taking rubric, the theory being that the means are directed to the illegitimate end of assisting one private person in realizing his frivolous desires to the great detriment of another person. In a due process case, the plaintiff would have the option of deciding between: 1) specific relief voiding the regulation, as well as damages under § 1983 of the Civil Rights Act for the temporary harm he suffered during the period he was bound; or 2) damages under § 1983 for the permanent harm done by the regulation.[183] The government should not be allowed to validate its acts having an illegal purpose by forcing compensation upon an unwilling party, whether it is attempting to take over his property or merely to onerously regulate it.

XI. CLEARING UP THE MUDDLE—SUMMARY AND CONCLUSION

The above hypothetical shows how the recent merger of substantive due process and takings rules has resulted in an unfortunate muddle. Properly, due process analysis—looking to whether there is a

182. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

183. 42 U.S.C. § 1983. *See supra* notes 44-51 and accompanying text.

valid public purpose for a challenged regulation or regulatory activity, and/or whether the means are fairly directed to reaching it—should decide the question of whether the government's imposition is legitimate and therefore whether it has the *power* to so act. This is the same kind of an issue as is addressed by the public use doctrine which outlaws outright government condemnations that are illegitimate because they are strictly for the benefit of a private party. That doctrine grants specific relief against the governmental seizure; the payment of compensation does not cure the defect. Similarly when a regulation fails a substantive due process means/ends nexus test, the exercise of governmental law-making power is illegitimate and the law should, at the option of the party harmed, be completely voided; even payment of full compensation should not be sufficient to sustain it. And of course, compensation should be paid under § 1983 of the Civil Rights Act for the temporary injustice visited upon the owner for the period until the regulation is invalidated.[184]

On the other hand, takings analysis—properly analyzed, looking to whether it is fair to impose the burden of a regulation, having a valid public purpose, upon one person rather than upon society in general,[185]—should decide the question of whether upon the exercise of the regulatory power, government must pay compensation to sustain it. It follows that when a law is fairly directed to a public purpose but unjustly bears upon an owner in such a way as to constitute a taking, the law should be upheld as long as the government is willing to pay compensation to validate it, but if it is not so willing, it should be voided. And when the government decides not to pay compensation but rather to acquiesce in the voiding of a regulation, damages for the temporary taking should be available under the *First English* case.[186]

Using the above analysis, not only does the means/public ends test bear upon the legitimacy of the exercise of law-making power, but takings tests that purport to examine the purpose of regulations should be viewed as involving similar questions. Thus the former noxious use test and the *Lucas* nuisance test logically go not only to the takings issue but also to the question of whether there is a valid public purpose for a regulation. And the consequence of there not being such a nuisance or noxious use—assuming there is no other valid purpose for the regulation—should be unconditionally to strike the law down as an illegitimate exercise of governmental power. This, of course, is just another illustration of the notion that, if a regulation has a private rather than a public purpose, even paying full compensation should be

184. *See supra* notes 44-51 and accompanying text.

185. Armstrong v. United States, 364 U.S. 40, 49 (1960).

186. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

insufficient to sustain it; the regulation should be stricken down as an improper usurpation by government.

It is unfortunate that in the recent jurisprudence of the Supreme Court in cases such as *Nollan* and *Lucas* the Justices have failed to make the basic distinction between illegitimate governmental impositions and unfairly onerous ones. The result of this will be a failure to achieve sound results in a fair number of cases where government regulations lack a legitimate public purpose.